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by

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Abstract

The article presents key issues relating to the methods of mobile termination rates calculation by the Polish National Regulatory Agency (NRA): the UKE President. It analyses the provisions of Polish telecommunications law of 2004¹ with respect to the rights and obligations of the UKE President. It invokes specific cases showing how problematic rates calculation is for mobile operators. The Polkomtel, PTK Centertel, PTC sp. z o.o. cases clearly show how unclear the calculation process may be in practice and illustrate how broad the discretionary powers of the UKE President are in this respect on the grounds of Polish telecommunications law. Highlighted is also the dispute between the Polish NRA and the European Commission. Even though the UKE President acts on the grounds of Polish law, its actions have to be compliant with the European telecoms package and take into utmost account the recommendations and comments issued by the European Commission.

Resumé

L'article présente les questions clés concernant les méthodes du calcul des tarifs de terminaison mobile par l'Agence Nationale de la Régulation Polonaise: le Président de l'UKE. Il analyse les provisions du droit de la télécommunication polonais de 2004 par rapport aux droits et obligations du président de l'UKE. Il décrit des cas spécifiques pour montrer la complexité du calcul des tarifs par les opérateurs des réseaux de téléphonie mobile. Les cas de Polkomtel, PTK Centertel, PTC sp. z o.o. prouvent que le processus du calcul n'est pas claire en pratique et que le pouvoir discrétionnaire du président de l'UKE, fondé sur le droit de la télécommunication polonais, est très vaste. L'article souligne aussi la dispute entre l'ANR polonaise et la Commission Européenne.

Classifications and key words: telecommunication; mobile operators; mobile termination rates (MTR); consultation process; notification process; recommendations; European Commission; UKE.

I. Introduction

Mobile Termination Rates (hereafter, MTRs) are systematically reduced by the Polish National Regulatory Authority (hereafter, NRA), which should, in the opinion of the telecoms regulator, decrease customer prices. The reductions in the MTRs influence the incomes of telecoms operators and their financial results. The European Commission has criticized the Polish NRA a number of times in 2010 and 2011 for its very slow and largely unjustified approach to

¹ Act of 16/07/04 on Telecommunication Law, Journal of Laws No. 171, item 1800, as amended.

the MTRs, which is meant to ensure symmetry and cost-oriented calculation in particular with respect to newcomers. In the Commission's opinion, the approach of the Polish NRA is on occasion not compliant with the principles of the Access and Framework Directive.

Mobile termination rates are defined as the wholesale prices which mobile operators charge to other mobile or fixed operators for terminating calls on their respective networks. Mobile termination rates fall under the competences of the Polish National Regulatory Agency (hereafter, NRA) – President of the Electronic Communications Office (in Polish: *Urząd Komunikacji Elektronicznej*; hereafter, UKE). The UKE President has in the past imposed remedies for regulating MTRs on three mobile operators active on the Polish market: Polkomtel S.A. (Polkomtel), Polska Telefonia Cyfrowa sp. z o.o. (PTC) and Polska Telefonia Komórkowa Centertel sp. z o.o. (PTK Centertel). These remedies included obligations to provide access on a transparent and non-discriminatory basis and the use of rates based on actual costs incurred by these operators. The European Commission stressed however that MTRs should be set according to the costs of an efficient operator providing the relevant service. Pursuant to the Commission Recommendation on the Regulatory Treatment of Fixed and Mobile Termination Rates in EU² (hereafter, the Termination Rates Recommendation), the setting of a common approach based on an efficient cost standard and the application of symmetrical termination rates would promote efficiency, sustainable competition and maximize consumer benefits in terms of price and service offerings. The Commission recognizes also that, in a competitive environment, operators would compete on the basis of current costs and would not be compensated for costs which have been incurred through inefficiencies. Historical cost figures need to be adjusted therefore to current ones in order to reflect the costs of an efficient operator employing modern technology. They must then be adjusted to the bottom up Long Run Incremental Cost mode (LRIC bottom-up model) that will be used by the Polish NRA from 2013.

The Termination Rates Recommendation derive from Directive 2002/19/EC of the European Parliament and Council of 7 March 2002 on access to, and interconnection of, electronic communications networks and associated facilities³ (hereafter, the Access Directive). Pursuant to Article 13 of the Access Directive, all NRAs should ensure that any pricing methodology to be mandated in their countries helps promote efficiency, sustainable competition and maximizes consumer benefits. According to Article 8(3) of the Directive

² Commission Recommendation of 7 May 2009 on the Regulatory Treatment of Fixed and Mobile Termination Rates in the EU C(2009) 3359 final.

³ OJ [2002] L 108/7.

2002/21/EC (hereafter, Framework Directive)⁴, the NRAs should also contribute to the development of the common market by cooperating with each other and with the Commission in order to ensure consistent regulatory practice in the telecoms field.

II. Legal basis

There are two possible scenarios for regulation regarding telecommunication access: at the request and *ex officio*. These two ways of concluding the access agreement are described in details below.

1. On request intervention as to the telecommunications access agreement

Pursuant to Article 26 of the Polish telecommunications law (in Polish: *Prawo Telekomunikacyjne*; hereafter, PT), a public telecoms network operator should conduct negotiations regarding the conclusion of an access agreement at the request of another telecoms operator. The purpose of such telecoms access agreements is to provide publicly available telecoms services and ensure their interoperability. The UKE President may interfere with civil law relationships between the parties involved or undertake actions *ex officio* in that respect only in situations clearly specified by the law.

Under Article 27 PT, the UKE President may specify, on a written request submitted by any of the parties to the negotiations (for the conclusion of a telecoms access agreement) or *ex officio* by means of a resolution, a time limit within which the negotiations must be closed. This period cannot be longer than 90 days from the day of the submission of the request for the conclusion of a telecoms access agreement. Where negotiations were not taken up, the party obliged to grant telecoms access refuses to do so, or the agreement is not concluded within the time limit set by the UKE President, any of the parties may submit to the NRA a request for the issuance of a decision on any of the contentious issues or to determine the conditions of cooperation. Such request should include a draft of the telecoms access agreement and mark the areas in the agreement upon which the parties were not able to agree.

Pursuant to Article 28 PT, the Polish NRA should make its telecoms access decision within 90 days of the date of the submission of the written request by any of the parties to the contested negotiations, taking account of the following criteria:

⁴ OJ [2002] L 108/33.

- i. interest of telecoms network users;
- ii. obligations imposed on telecoms undertakings;
- iii. promotion of modern telecoms services;
- iv. nature of the contentious issues that arose during the negotiations and the practical possibility of implementing solutions related to the technical and economic aspects of telecoms access, both those proposed by the negotiating telecoms undertakings and those constituting alternative solutions;
- v. ensuring:
 - integrity of the network and interoperability of services,
 - non-discriminatory conditions of telecoms access,
 - development of a competitive market for telecoms services;
- vi. market power of those telecoms undertakings whose networks are being interconnected;
- vii. public interest, including environmental protection;
- viii. maintaining the uninterrupted provision of universal services.

The UKE President has the right to interfere with the parties' negotiations in order to facilitate them and the time limit set to finalize them. Nevertheless, this right should not be understood broadly and thus should be used only as an exception to the general freedom of contracts rule. Additionally, pursuant to Article 28(5) PT, in cases where the parties conclude a telecoms agreement, the regulatory decision on telecoms access expires by virtue of the law in parts covered by the agreement ultimately concluded.

According to Article 43a PT which came into force at the end of 2010, operators holding Significant Market Power (hereafter, SMP), and thus forced to fulfil certain regulatory obligations relating to telecoms access, may request the UKE President to approve further conditions and details of the remedies that can support the main obligations imposed on the operator by the Polish NRA. These entities are also authorised to propose other conditions of their telecoms activity and negotiate them with the UKE President, whereby the latter can request any further information subject to that entity's proposal. The NRA will assess whether the proposition will have a positive impact on market competition, development and efficient use of modern telecoms infrastructure, and whether it improves the quality of services for end-users. The UKE President is obliged to issue such a decision within 90 days of receiving an appropriate submission. An administrative decision which accepts such (negotiated) provisions is binding on the requesting party⁵ and the NRA

⁵ By contrast, previously negotiated agreement between the NRA and the incumbent fixed operator (TP S.A.) on the details and conditions of implementation of its regulatory obligations is non-binding, based on voluntary commitments. The UKE President cannot thus enforce it by way of fines. Its implementation is based on mutual undertakings: TPSA's agreement

is authorised to impose a fine if the latter fails to perform or improperly performs the obligations assigned to it during this procedure and confirmed in the form of a regulatory decision issued by the UKE President.

2. UKE decisions issued *ex officio*

As was mentioned above there are two different grounds for commencing a regulatory procedure in the Polish telecoms field: a request submitted by an interested party or *ex officio*. In the first situation, the NRA may take actions on a party's request either if the opposing party fails to start the negotiations or if the sides fail to reach an agreement within the time frame indicated by the UKE President. In the second situation, the NRA is entitled on the grounds of Article 29 PT to modify *ex officio*, by means of an administrative decision, the content of a telecoms access agreement or to oblige the parties to the agreement to modify it themselves. Changes of that type can be forced upon the parties in cases justified by the need to protect end-user interests and to ensure effective competition or interoperability. This particular competence of the UKE President limits therefore the freedom of contract normally enjoyed by private parties. As a result, it should be exercised with restraint, that is, only in the aforementioned situations specified in the provisions of the Polish telecommunications law.

The two aforementioned proceedings are conducted for different reasons. Decisions based on Articles 27 and 28 PT are issued in order to lead to the conclusion of a telecoms access agreement or its modification; decisions based on Article 29 PT focus on the protection of the public interests.

3. Consultation requirement and exceptions thereto

According to Article 15 PT, the UKE President should, prior to taking a regulatory decision, and in particular those concerning telecoms access, carry out consultation proceedings which allow the parties concerned to express in writing their opinions about the draft within a specified time frame. The UKE President may issue a decision concerning telecoms access without carrying out a consultation only in exceptional cases, which require urgent actions to be taken by the NRA due to a direct and serious threat to competition or to end-user interests. Such decision cannot however apply for more than 6

to introduce a range of behavioural commitments, and NRA's withholding from a functional separation of the incumbent.

months (an 'interim' decision). The issuance of other decisions in the same case shall be preceded by consultation proceedings.

III. Facts of the case

1. The first round of UKE decisions

The UKE President identified in 2006 three leading Mobile Network Operators (hereafter, MNOs): Polkomtel, PTK Centertel and PTC as holding SMP. The NRA proceeded to impose on all three of those MNOs the following regulatory obligations: transparency, non-discrimination, network access and price control (prices based on costs incurred). Subsequently, the UKE President questioned the justification for the levels of the cost-based fees as presented by the MNOs and their auditors. As a result, the NRA imposed on the aforementioned operators another regulatory obligation: to adjust their MTRs to the level determined in the glide path formulated by the Polish NRA for the years 2007–2010.

The UKE President imposed therefore on the three MNOs an obligation deriving from Article 40 PT in relation to the calculation of access fees based on the costs actually incurred by the operators. In the decisions issued in 2007, the UKE President determined a 3 year schedule for the lowering of the rates to last until 1 May 2010 (MTRs 2007 Decisions⁶). Cost reductions were planned to be spread over time so the MNOs could modify appropriately their respective retail and wholesale offers. As a result of the MTRs 2007 Decisions, the three key Polish mobile operators were obliged to present annually to the NRA a cost justification for the MTRs used in their networks.

In 2008, in other words only one year after the issuance of the original decisions, the UKE President changed the aforementioned glide path which was originally supposed to be binding until 2010. The new decisions was issued (MTRs 2008 Decisions⁷) which set the rates as follows: between 01 January

⁶ MTRs 2007 Decisions: decision of the UKE President of 26 April 2007, DRTH-WKO-6042-7/06(19) (MTR 2007 *Polkomtel*); decision of the UKE President of 26 April 2007, DRTH-WKO-6042-11/06 (MTR 2007 *PTC*) and decision of the UKE President of 26 April 2007, DRTH-WKO-6042-10/06(12) (MTR 2007 *PTK Centertel*).

⁷ MTRs 2008 Decisions: decision of the UKE President of 30 September 2008, DHRT-WKO-6042-6/08(11) (MTR 2008 *Polkomtel*); decision of the UKE President of 22 October 2008, DHRT-WKO-6042-8/08(29), (MTR 2008 I *PTC*); decision of the UKE President of 30 September 2008, DHRT- KO-6042-7/08(8) (MTR 2008 *PTK Centertel*).

2009 and 30 June 2009 – 0,2162 PLN (ca. 0,05 EUR), from 01 July 2009 onwards – 0,1677 PLN (ca. 0,04 EUR).

The UKE President did not claim in the MTRs 2008 Decisions that the lowering of the rates previously set was motivated by a change in the factual situation on Polish telecoms markets, a situation that would make it necessary to introduce lower rates than those set out in the MTRs 2007 Decisions. The NRA pointed instead to the need to protect the interests of end-users and effective market competition as the main reason for the issuance of the MTRs 2008 Decisions. According to the NRA, these objectives would be achieved by ensuring maximum benefits with respect to diversity, price and quality of telecoms services, by further decreasing the MTRs and thus by creating the conditions necessary for effective competition. The UKE President stated also that this would lead to an elimination or reduction of fixed-to-mobile substitution whereby users resign from the use of fixed-line services in favour of mobile services.

Interestingly, according to another document published on the NRA's website, the decrease of the use of fixed-line services was reported to be caused by a high market penetration level of mobile operators. According to the respondents of a survey conducted by the Polish NRA, mobile services are better matched to the needs of their clients than fixed-lines services. The UKE President emphasised in this context that lowering the MTRs was beneficial to fixed-line operators but only on the condition that they would decrease their retail charges for fixed-to-mobile network connections.

According to Article 15 PT, the UKE President should conduct a consultation procedure with the parties concerned prior to taking of a regulatory decision on MTRs. However, neither the 2007 nor the 2008 MTRs Decisions were preceded by consultations despite the fact that, the obligation to conduct them can be disregarded pursuant to Article 17 PT only in exceptional cases that require urgent actions. The decisions issued without a consultation cannot be binding for a period of time exceeding 6 months. Moreover, Article 17 PT implements in fact Article 7(9)⁸ of the Framework Directive and thus the adoption of such interim decisions should therefore not only be fully justified but also notified to the Commission.

Despite having an immediate effect, the MTRs 2008 Decisions decreasing the rates was not actually applied by the three aforementioned MNOs in their existing access and interconnection agreements, giving rise to disputes between mobile and fix operators. The UKE President issued therefore several 'interim' decisions at the beginning of 2009 for the period of 6 months as defined in the PT and these decisions were subject to immediate executability.

⁸ Previously Article 7(6) of the Framework Directive.

Such decisions modified telecoms access agreements between the individual operators as to MTR rate⁹. For example, in the Netia and GTS Energis cases, according to the UKE President, Netia and GTS Energis requested Polkomtel to amend their telecoms access agreements with respect to its MTR. At the request of these entities, the UKE President issued under Article 27 PT the requested decisions indicating a time limit for the conclusion of the necessary negotiations. Since the parties failed to reach an agreement in the specified time frame, Netia and GTS Energis applied for a separate regulatory decision to be issued by the UKE President amending their access agreements according to the annex attached to these applications. The UKE did not initially notify the Commission of its individual dispute settlement decisions but ultimately changed its approach in June 2009¹⁰ and notified its decisions which set the MTRs level¹¹.

The three MNOs appealed some of the interim decisions issued by the NRA to the Polish Court of Competition and Consumers Protection (in Polish: *Sąd Ochrony Konkurencji i Konsumentów*; hereafter, SOKiK) and to the Administrative Courts¹². The judgments were inconsistent however and went into two directions¹³. Some of the contested regulatory decisions were repealed by Polish courts¹⁴; SOKiK stressed for instance that Article 17 PT

⁹ In particular with regard to Polkomtel, among others the following decisions were issued: a) decision of 21 January 2009 amending the agreement between GTS Energis sp. z o.o. and Polkomtel with respect to the change of MTR in public, mobile telephone network owned by Polkomtel; b) decision of 21 January 2009 amending the Network Integration Agreement between Netia S.A. and Polkomtel with respect to the change of MTR in public, mobile telephone network owned by Polkomtel; c) decision of 9 January 2009 amending the agreement between Polska Telefonia Cyfrowa sp. z o.o. (PTC) and Polkomtel with respect to the change of MTR; d) decision of 24 February 2009 amending Network Connection Agreement and the settlements rules concluded between Polska Telefonia Komórkowa Centertel sp. z o.o. (PTK Centertel) and Polkomtel with respect to the settlements conditions for MTR both in the PTK Centertel's mobile network and Polkomtel's mobile network.

¹⁰ Article 7 procedure under the Framework Directive of the EU telecoms rules (MEMO/09/539) requires NRAs to notify the Commission of their draft regulatory decisions in the telecoms markets.

¹¹ See for example PL/2010/1027 by which UKE notified an individual dispute settlement of yet another new entrant MNO – AERO2.

¹² Example: PTK Centertel sp. z o.o. appealed from MTR 2008 decision.

¹³ Order of the Supreme Administrative Court of 6 April 2011, II GSK 477/10; judgment of the Supreme Administrative Court of 3 February 2011, II GSK 59/10; judgment of the Regional Administrative Court in Warsaw of 2 December 2009, VI SA/Wa 591/09; judgment of the Court of Appeals in Warsaw of 12 January 2011, VI ACa 591/10.

¹⁴ Example: judgment of the Regional Administrative Court in Warsaw of 25 January 2011, VI SA/Wa 2359/10 (*Polkomtel*); judgment of the Regional Administrative Court in Warsaw of 28 April 2011, VI SA/Wa 478/11; judgment of the Regional Administrative Court in Warsaw of 30 March 2011, VI SA/Wa 1538/10; judgment of the Regional Administrative Court in Warsaw

has an exceptional character and cannot be overused. This provision makes it possible to issue a regulatory decision without prior consultation but only in exceptional cases where immediate actions are required by the direct threat to market competition or consumer interests. SOKiK judged that this was not the case in relation to the contested interim decisions. On the other hand however, some of the interim decisions issued in 2009 were in fact upheld.

2. Consultation proceedings with respect to the drafts of UKE decisions

In March 2009, the UKE President informed relevant telecoms operators about the commencement of administrative proceedings in order to issue a regulatory decision (not ‘interim’ but ‘standard’ one) amending their telecoms access agreements. The NRA requested each of the parties to provide their standpoint on the draft regulatory decisions. The UKE President announced afterwards, under Article 16(1) PT, the commencement of consultation proceedings with respect to the draft decisions amending the agreements concluded between the MNOs and, among others, Multimedia Polska, GTS Energis, TP S.A. The drafts concerned the change in the MTRs to be applied in the mobile, public telephone network. These decisions were to be issued under Article 29 PT and Article 104(1) of the Act of 14 June 1960 on the Administrative Procedure Code¹⁵ (in Polish: *Kodeks Postępowania Administracyjnego*; hereafter, KPA) and were immediately effective.

Under Article 61(4) KPA, the UKE President notified the parties about issuing a decision amending their access agreement with respect to MTRs 2008 Decisions and asked them to provide their standpoints concerning the draft. In the opinion of the NRA, *ex officio* proceedings are a consequence of the above-mentioned interim decisions issued at the beginning of 2009, under Article 17 PT. They thus expire after July, August or September 2009 (depending on the decision). The Polish NRA indicated also that it has decided *ex officio* to change the content of access agreements in order to protect from a threat to consumer interests and due to the need to establish effective market competition.

None of these draft decisions were notified to the Commission. The UKE President was of the opinion that the setting of concrete MTRs does not constitute a new remedy but merely clarifies the implementation details of a previously imposed regulatory obligation. The NRA claimed additionally

of 4 February 2011, VI SA/Wa 2614/10; judgment of the Regional Administrative Court in Warsaw of 16 February 2011, VI SA/Wa 1573/10; judgment of the Court of Appeals in Warsaw of 11 January 2011, VI ACa 784/10.

¹⁵ Journal of Laws 2000 No. 98, item 1071, as amended.

that a decision relating to the setting of specific MTRs is not a regulatory decision subject to the EU notification duty. However, pursuant to the ruling of the Polish Supreme Administration Court of 31 May 2009, regarding the setting of MTRs, a decision of the UKE President issued on the basis of Article 40(4) PT is in fact a decision related to regulatory obligations¹⁶. Therefore, pursuant to Article 6 and 7 of the Framework Directive, the UKE President was indeed obliged to conduct a consultation procedure prior to its issuance as well as notify the draft to the Commission. The aforementioned judgment is consistent with the standpoint of the Commission according to which, the setting of MTRs (including the details or amendments to the glide path formulated by a NRA) constitutes a regulatory obligation as set forth in Article 18 PT and affects trade between EU Member States. With respect to the above, drafts of MTRs amendments should thus be notified to the NRAs of other Member States as well as to the European Commission.

3. The second round review of the relevant market

In the second round review of the relevant market¹⁷, the UKE President identified the same three mobile operators (Polkomtel, PTC and PTK) as having SMP in the wholesale markets for voice call termination on their individual mobile networks¹⁸. Remedies were thus imposed on all three, including price control¹⁹. According to these decisions, the MTRs are set by the NRA on a yearly basis and based on the (actual) costs incurred by the individual operators. The UKE President proposed that from 1 January 2010, the rates previously determined in the MTR 2008 Decisions (0.1677 PLN, ca. EUR 0,04) shall continue to be used by all three MNOs. In its comments, the Commission highlighted the need to set MTRs with respect to efficient, rather than actual, costs and invited the Polish NRA to take account of its Termination Rates Recommendation. The Commission further invited the UKE President to define the MTRs applicable beyond 2010 sufficiently in advance so as to ensure transparency and legal certainty for the market. The UKE President imposed in decisions applied to P4²⁰

¹⁶ Order of the Regional Administrative Court in Warsaw of 6 May 2008, VI SA/Wa 266/08.

¹⁷ Case PL/2009/0904.

¹⁸ SMP decisions 2009: decisions of the UKE President of 29 September 2009: DART-SMP-6043-9/08(26) (*Polkomtel*); DART-SMP-6040-4/09(33) (*PTC*); DART-SMP-6040-3/09(26) (*PTK Centertel*).

¹⁹ Case PL/2009/0991.

²⁰ SMP decision of the UKE President of 18 December 2008, DART-SMP-6043-10/07(34) (*P4* SMP Decision); furthermore P4 requested to change individual cooperation agreements with operators and at a request UKE issued on 26 June 2009 particular decisions: amending the MTR in cooperation agreement between P4 and PTC, DHRT-WWM-6080-29/09(35);

and CenterNet²¹ a glide path towards cost orientation on two further market entrants in the Polish mobile market: P4²² and CenterNet²³. However, in the case of CenterNet it was not based on a market analysis and a determination of CenterNet's SMP.

4. Asymmetric vs. symmetric MTRs oriented towards the costs of an efficient operator

The Polish NRA's determination of the MTRs for small operators was not preceded²⁴ by the establishment of their SMP but formulated within dispute resolution procedures conducted pursuant to the Article 27 PT. According to the comments submitted in this respect by the European Commission, the MTRs should be set in a general manner and applicable to interconnections between all operators, and not only those covered by the dispute settlements²⁵. In fact, the UKE President did not regulate the MTRs charged by new entrants for calls originating in the networks of fixed operators in Poland as well as those from international fixed and mobile operators. National regulatory authorities, when carrying out their tasks, should ensure that no discrimination occurs in similar circumstances in the treatment of undertakings providing electronic communications networks and services. The costs of market entry and infrastructure roll out must, in any event, not be borne by competitors (by way of excessive termination rates) and ultimately their consumers. In the opinion of the UKE President, allowing new entrants to use higher MTRs enables them to build or develop their own infrastructure and catching up to operators with significant market power. New entrants could thus become able in the near future to render telecoms services through their own networks.

amending the MTR in cooperation agreement between P4 and PTK Centertel, DHRT-WWM-6080-116/09(22); decision as to MTR in cooperation agreement between TP S.A. and P4, DHRT-WWM-6080-123/09(24) and as to MTR in cooperation agreement between P4 and Polkomtel, DHRT-WWM-6080-38/09(45).

²¹ The UKE issued SMP decision for CenterNet dated 28 February 2011, DART-SMP-6040-14/09(19) (*CenterNet* SMP Decision); moreover for example UKE issued decision on 30 October 2009 amending the MTR in cooperation agreement between CenterNet and Polkomtel, DHRT-WWM-6080-129/09 (26). See: European Commission decision dated 22 December 2010 as to case PL/2009/1021 and case PL/2010/1162.

²² See cases PL/2008/0794 and PL/2009/0996.

²³ See case PL/2009/1021. The Commission invited UKE to impose cost orientation, and to revise the level of the asymmetry and recalled the need to notify the price levels under the consultation procedure.

²⁴ Normally remedies are preceded by market analysis/SMP.

²⁵ See comment made in case PL/2010/0961 in relation to price setting in dispute settlement.

According to the Polish NRA, MTRs asymmetry helps new entrants and small operators to build up their own infrastructure.

In 2008, the UKE President identified another MNO, P4, as having SMP²⁶ and imposed on it the following regulatory obligations: network access, non-discrimination, transparency and non-excessive pricing. The NRA did not however impose on P4 the cost calculation obligation and thus, it is difficult to assess the meaning of 'non-excessive' pricing seeing as the UKE President is unlikely to have the necessary data on the costs of P4²⁷. In October 2009, the NRA notified the European Commission its draft decision proposing a glide path for P4 from asymmetric towards symmetric rates to be reached by 1 January 2014. The Commission invited the regulator to revise its price control methodology and the margin allowed for P4. It also recommended for a new glide path to be set for P4 which would result in lower MTRs, taking into account the need for P4 to become efficient over time.

The gradual decreasing of the MTRs has generally had a positive impact on the development of market competition and users in Poland. The regulatory aim was to decrease MTRs in order to lower retail tariffs. Ultimately, retail tariffs are lower thanks to strong competition between operators and MTRs asymmetry, which allows new entrants to cross-subsidise outgoing calls and/or handsets to attract customers. The question arises, however, whether the additional financial resources made available to new entrants thanks to asymmetric MTRs are not only spend on 'price war' or whether they are actually also allocated to infrastructure developments. The first situation could be recognised as a cross-subsidy and could easily lead to potential frauds.

MTR asymmetry influenced the development of competition and decreased the concentration level of Polish mobile telephone markets. It allowed new infrastructural operators, especially P4, to enter the market and rapidly gain subscribers despite the fact that the market was already saturated. The negative consequence of the use of MTR asymmetry was a possible cross-subsidisation that could result in frauds and confusions in retail tariffs. Moreover, because of the competition between the MNOs, it is necessary to carefully consider if, and for how long, should new entrants benefit from rates asymmetry. Preferential treatment in this respect should certainly not be automatically granted.

CenterNet, Mobyland, Cyfrowy Polsat and Sferia, Aero2 are all new entrants on the Polish mobile market (the first three entered the market in 2008 and 2009). Some of these operators are planning to build up their own infrastructure and provide retail services in the near future based on commercial agreements for national roaming with one of the MNOs. However,

²⁶ Please see footnote 18 above.

²⁷ The costs analyses of new entrants MTRs are based on data being in the UKE possession concerning the other comparable operator.

CenterNet's operations are based on Mobyland's infrastructure. The UKE President decided to impose asymmetric MTRs so that new entrants may adopt higher prices than the MNOs - the latter must impose cost-oriented prices. However, market analysis has lead the UKE President to decide that operators that do not have their own access network infrastructure (full MVNOs) will charge (from 1 July 2011) equal rates as operator who offers them national roaming service (host MNOs).

On 6 January 2011, the European Commission issued its decision, urging the Polish NRA to reconsider its approach. It is not the first time that the Commission criticized the UKE President for her actions regarding MTRs. The Commission questioned the automatism in assigning a four year asymmetry period and requested a rational assessment of the transitional period when asymmetry is in force. After the transitional period, MTRs of all operators should be symmetric and their level should mirror the costs of an efficient operator in line with the Termination Rates Recommendation. The Commission urged the UKE President to impose a cost-orientation obligation (cost-based prices) on new entrants and invited the NRA to carefully assess the level and duration of MTRs asymmetry granted to them in its forthcoming decisions.

As stated in the Termination Rates Recommendation, MTRs applicable to new entrants may be subject to a higher unit cost for a transitional period, before the new entrants reach minimum efficiency, but only in justified situations based on a market analysis and cost calculation. Asymmetry should thus not be automatic. The Commission stated that four years might be a maximum reasonable time for new operators to recoup their set-up costs. Based on the dates when the new entrants became operational, MTRs asymmetry should thus come to an end in Poland in June 2012 in the case of Mobyland and CenterNet for instance. The Commission wants the UKE President to set cost-oriented MTRs for new entrants. In this respect, the NRA should demonstrate that the proposed level and duration of asymmetry corresponds to higher costs incurred by those operators.

In the case of Aero2's, an operator which was preparing its market entry but could not agree with other operators on MTRs level, the UKE President issued a dispute settlement decision based on Article 27 PT (instead of a regulatory decision assessing whether Aero2 holds SMP). The NRA argued that it could not analyze the market for call termination in Aero2's network because the latter was not yet providing such services. The Commission commented that the measures proposed by the UKE President should be based on a forward-looking analysis anticipating Aero2's market entry. Therefore, the Commission urged the NRA to fix Aero2's MTRs for a short, transitional period only and carry out a full market analysis for the termination of voice calls on Aero2's

mobile network without delay. The Commission noted also that the UKE President intends to set the MTRs to be charged by Aero2 at 0,57 PLN/min (ca. 0,226 EUR), as requested by Aero2. This level is however well above the MTRs charged across Europe²⁸ and would create a substantial asymmetry in comparison to other operators in Poland²⁹. The NRA justifies its approach by Aero2's need to finance the roll-out of its infrastructure and by the advantages for users linked to a further market entrant. However, the costs of market entry and infrastructure roll-out must not be borne by the competitors of the new entrant, by way of excessive termination rates, and thus ultimately, they should not burden consumers.

It is worth mentioning that the actual level of Aero2's termination rate is not only asymmetric but also significantly above the MTRs set for established MNOs in Poland. In some cases, it exceeds them by 170%.

5. Two proposals notified by the UKE President to the Commission.

Investment settlements between operators and the UKE President

In March and April 2011, the Polish NRA notified the European Commission of two sets of draft decisions referring to the same subject. The first notification (first proposal) was assessed by the Commission between 3 March and 4 April 2011. The UKE President notified therein its draft measures concerning the details of price control obligations imposed on the three aforementioned operators: Polkomtel, PTC and PTK Centertel which hold SMP in the markets for voice call termination on their individual mobile networks. On 5 April 2011, the Commission registered another notification (second proposal) by the Polish NRA concerning the UKE President's approval of voluntary commitments submitted by four MNOs: Polkomtel, PTC, PTK Centertel as well as P4. The four operators committed themselves to make infrastructure invests in those Polish regions which were lacking mobile network coverage (white spots) due to an alleged lack of economic feasibility³⁰. In exchange for the investment commitments, the four mobile

²⁸ Nevertheless this comment applies to all other aforementioned cases related to new entrance asymmetry.

²⁹ C(2010)7039, Brussels, 6 October 2010.

³⁰ Based on data provided by local authorities, the NRA estimates that ca. 300 000 people live in white spot areas in Poland. The areas not covered by mobile networks have been divided by the four operators so each operator is obliged to invest in specific areas – see C(2011) 3199, Brussels, 05 May 2011.

operators were due to receive higher MTRs than those originally proposed under the first (recently submitted) notification³¹.

In the first proposal, the MTRs for the original three MNOs were based on the costs actually incurred by PTK Centertel and Polkomtel in 2009 (the cost justification provided by PTC was rejected because the data was in the opinion of the NRA inaccurate and could not be used for price calculation purposes). On this basis, the UKE President established a symmetric termination rate of PLN 0.0966/min (ca. 0,025 EUR) applicable to all of the three major MNOs³². This tariff was supposed to be valid until the next approval of cost calculations submitted by these operators. If the NRA rejects the operators' proposal, a new price decision would be issued by the UKE President³³. Despite the Commission's earlier comments, the Polish NRA's approach was still based on costs actually incurred by individual operators (MNOs), or some not specified assumptions in the case of new entrants. However, the UKE President explained in response to the information request submitted by the Commission in line with the Termination Rates Recommendation, that a model that reflects the costs of an efficient operator will be adopted from 1 January 2013.

In its comments to the draft decisions, the Commission said that the UKE President's first proposal will lead to rates that seem to be getting closer to the cost of an efficient operator but are still based on the actual costs of individual operators. The Commission appreciated, however, that the Polish NRA proposes to adopt from 1 January 2013 a bottom up Long Run Incremental Cost model (BU-LRIC), in line with the Termination Rates Recommendation. The fact was also acknowledged that the UKE President plans to adopt consulted draft measures only where on-going negotiations with mobile operators concerning infrastructure investments would fail. The Commission stated in its comments that the NRA did not take into consideration the fact that the MTRs should be oriented towards the costs of an efficient operator. The use of actual costs incurred by the three MNOs, as well as the recovery of costs which are not incremental to the provision of wholesale termination

³¹ Case PL/2011/1195.

³² The proposed rate for all three MNOs was calculated as an arithmetic average of the prices calculated for PTK and Polkomtel. PTC data was seen as inaccurate; see C(2011) 2477, Brussels, 4 April 2011.

³³ MNOs are obliged to submit (every year) a justification of their MTRs level based on costs incurred, on the basis of data for the last year, not later than 120 calendar days from the end of the relevant year. If the UKE President considers that the MNOs' calculations are incorrect, it may set the level of MTR, adjusting the cost calculations provided by the operators. Thus, the UKE President will issue price decisions only as a result of incorrect calculations submitted by operators.

services, can lead to distorted investment signals and higher prices for the originating operators and, consequently, their consumers.

Investment settlements between operators and the UKE President

In parallel to the abovementioned first consultation procedure, the UKE President discussed with the MNOs whether, in exchange for a softer glide path for their MTRs, they would carry out infrastructural investments in those Polish regions where mobile network roll-out is seen as economically not feasible. The NRA stressed here that any draft measures concerning amendments of their regulatory obligations resulting from those discussions will be consulted at EU level prior to their adoption. Therefore, between January and June 2011, a number of meetings took place between the representatives of the Polish NRA, MNOs (Polkomtel, PTC, PTK Centertel, P4) and the representatives of the National Chamber of Commerce comprised mostly of fixed-line operators (KIGEiT). The purpose of these meetings was the drafting of a precise investment plan for Polish white spots and 3G network investments in unfeasible areas. Then, pursuant to Article 43a PT, the operators requested the NRA to issue appropriate investment decisions.

The UKE President notified the draft decisions to the Commission on 5 April 2011 (second proposal). According to the NRA, the difference between the prices currently proposed and those previously consulted (first proposal), results from the additional costs to be incurred by the MNOs due to the roll-out of new infrastructure in Polish white spots. Therefore, also for the second notification, the UKE President considered that its proposed prices are cost-oriented. The Commission observes however that the prices proposed in the second notification for the period until 1 July 2012 were in fact 57% higher than the MTRs proposed by NRA only a month earlier. Despite that fact, the UKE President still argued that the proposed MTRs are cost-based in both cases.

In the Commission's opinion the measures proposed by the Polish NRA are not in line with the Access Directive and fail to lead to MTRs that would be in line with the Termination Rates Recommendation³⁴. According to the provisions of the Access Directive, obligations imposed on operators with SMP should be based on the nature of the identified problem, justified and proportionate in the light of the regulatory objectives expressed in Article 8 of the Framework Directive. In its notification submitted in 2009³⁵, the UKE President did not explain the problem of insufficient network coverage in

³⁴ C(2011) 3558, Brussels, 16 May 2011.

³⁵ Case PL/2009/0904.

Poland. In the draft presented most recently, the NRA also failed to provide the Commission with evidence why it considers the change of the previously proposed MTRs justified and proportionate.

The Commission pointed out that its Recommendation does not allow for the granting of higher MTRs to a select number of MNOs in return for any sort of commitments in particular, if this leads to a rate asymmetry in favour of such operators. It seems especially difficult to justify higher rates than the ones currently proposed, with objective cost differences outside the control of the operators concerned, which is one of the requirements for higher rates set in the Termination Rates Recommendation. It would appear that a commitment to invest in rural areas is within the control of the operators concerned³⁶.

Upon the request based on Article 43a PT and with regard to the second proposal notified to the Commission, the UKE President ultimately issued a new set of MTRs decisions for PTK Centertel and Polkomtel setting their MTR at 0,1520 PLN (ca. 0,038 EUR). These decisions were issued upon their declaration to invest in telecoms infrastructure in Polish white spots (rural areas). The KIGEiT's approval of such investment decisions was also needed and subjected to the withdrawal of pending appeals against previous MTRs decisions. The new decisions were thus eventually issued based upon the operators' commitment to withdraw their appeals against earlier UKE decisions, which questioned the MTRs previously set by the NRA. Nevertheless, PTC did not agree to such a conditional decision. Therefore, on 27 May 2011, the UKE President directed to it a decision based on the first proposal notified to the Commission and set PTC's MTRs on the level of 0,0966 PLN/min (ca. 0,025 EUR) with effect from 1 July 2011. PTC strongly opposed that decision as it would lead to a massive asymmetry between the three largest MNOs – asymmetry not supported by any mandatory cost calculation or regulatory justification. After further negotiations, a settlement between the NRA and PTC was finally reached and the UKE President issued on 29 June 2011 yet another new decision, subsequently withdrawing its earlier decision.

The MTR decision for PTC is now consistent with those issued for the two largest Polish mobile operators – PTK Centertel and Polkomtel. They all set their MTRs at 0,1520 PLN/min between 1 July 2011 and 30 June 2012 and 0,1223 PLN/min from 1 July 2012. It is worth noting that the Commission clearly stated that its MTR Recommendation does not allow for the granting of higher MTRs to a select number of MNOs in return for any sort of commitments (e.g. infrastructure investments), in particular if this leads to asymmetry in rates in favor of such operators. Moreover, NRA, when

³⁶ C(2011) 2477, Brussels, 4 April 2011.

carrying out their tasks, should ensure that in similar circumstances there is no discrimination in the treatment of undertakings providing electronic communications networks and services.

Approximately four weeks have passed since the issue of the asymmetric MTRs decisions concerning the three largest MNOs in Poland. Apparently, the UKE President was both willing and able to establish different MTRs among almost equal competitors, which would cause massive market disturbances. Moreover, the NRA notified the Commission two different regulatory proposals concerning the very same subject but with different MTRs each: (i) 0,0966 PLN and (ii) 0,1520 PLN. Not only that, the decisions ultimately issued by the Polish NRA were based on a mixed approach that related to both notifications. It means that the UKE President had notified the Commission two sets of hypothetical decisions with the purpose to ultimately choose, upon its own discretion, one or two of them simultaneously and apply to operators. As a result, the hybrid decisions ultimately issued were never notified to the Commission. More importantly, in none of its two sets of notifications did the Polish NRA consult with the Commission, or in fact with other NRAs, its intention to impose asymmetric MTRs among equal operators. Such situation could be considered a potential infringement of Article 7 of the Framework Directive.

IV. Consequences of calculating MTR in European law

The European Commission issued an opinion to the UKE President commenting on its MTRs calculating methods. Pursuant to the Termination Rates Recommendation of 2009, termination rates should be set at the cost level which would be faced by an efficient operator providing the relevant service. The Commission recommended furthermore that the NRAs apply a long run incremental costs (LRIC) methodology for setting termination rates by the end of 2012.

In its opinion sent to the UKE President, the Commission indicated that the methodology chosen by the Polish NRA (charges based on costs incurred) does not promote efficiency and therefore could only be considered a short-term solution. The Commission invited the UKE President to follow the costing approach recommended by the Commission so as to apply (from 31 December 2012) MTRs set according to the methodology set out in the Recommendation.

The Commission also reminded the Polish NRA that if it did decide to impose price regulation on the basis of a comparison with the pricing structure

found in other countries, it should carefully select the objective criteria and clearly justify the reasons for which it believes that the relevant market(s) in the chosen countries are most suited as the basis for such comparison, taking into account the differences between the conditions prevailing on the relevant market(s) in these countries and its home market.

The Commission indicated also that pursuant to the Framework Directive, when a NRA considers a change to the current MTRs level, it is required to notify that fact to the Commission and the NRAs of other Member States in order to ensure that regulatory decisions taken at national level do not have an adverse effect on the single market. Moreover, under Commission Recommendation 2008/850/EC³⁷, price levels, amendments to the methodology used to calculate costs or prices as well as the determination of glide-paths are all considered to be material changes to the nature or scope of a regulatory remedy that have an appreciable impact on the market and should therefore be notified following the standard notification procedure.

V. Conclusions

1. Calculating MTRs internationally

There is no single approach towards MTRs among the countries. Some only regulate MTRs for fixed-to-mobile calls. In others, mobile networks are required to apply a single regulated termination charge regardless of where the call terminates. In many countries, there is still much debate about the appropriate level of interconnection rates. In the United States for example, MTRs are generally much lower than in the EU. Operators are free to negotiate rates as long as they are symmetric. Moreover, fixed-line incumbents are required to set cost-based termination rates. This system results in low or even non-existent (zero) termination rates. In such a case however, users usually pay for incoming calls.

Looking at the situation in the EU market, it is interesting to analyze the case of Slovakia. Its NRA has issued its methodology for calculating MTRs whereby operators are obliged to calculate their interconnection charges based on the fully allocated historical cost model proposed by the regulator, which by the way is subject to numerous appeals by Slovak mobile operators.

³⁷ Commission Recommendation 2008/850/EC of 15 October 2008 on notifications, time limits and consultations provided for in Article 7 of Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communications networks and services, OJ [2008] L 301/23.

The European Commission has welcomed the Slovenian NRA's revision of its MTRs regulation, eliminating asymmetries therein, adopting an appropriate benchmarking method, and developing a forward-looking cost model of its own for setting regulated prices to be used in the future. The European Commission has criticised on the other hand a German proposal for the regulation of call termination rates until November 2012. The Commission objected here to the use of: asymmetric rates, the inclusion of the spectrum into the cost methodology and the exclusion of MVNOs. The UK telecoms regulator, Ofcom, has launched a consultation on MTRs. The proposal aims to cut the rates by close to 90% by 2015, to as low as 0.5 pence per minute, while applying symmetric rates across all five active market operators from 2012.

2. Conduct contrary to EU regulations

The UKE President's conduct may, for various reasons, be treated as not compliant with the Commission Termination Rates Recommendation. First, MTRs should be set according to the costs of an efficient operator and not cost actually incurred by the regulated operators. In addition, the convergence of MTRs should be finished by the end of 2012, henceforth symmetric rates should apply. It is also worth remembering that according to the Access Directive, exceptions to the obligation to conduct consultation proceedings before issuing a regulatory decision should be used in limited and justified situations only. Finally, market entry and infrastructure roll-out costs must never be borne by competitors (by way of excessive termination rates) and ultimately their consumers.

Directives and Recommendations

Directive 2002/19/EC of the European Parliament and of the Council of 7 March 2002 on access to, and interconnection of, electronic communications networks and associated facilities, OJ [2002] L 108/7 (Access Directive).

Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services, OJ [2002] L 108/33 (the Framework Directive).

Commission Recommendation 2007/879/EC of 17 December 2007 on relevant product and services markets within the electronic communications sector susceptible to ex ante regulation in accordance with Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communications networks and services, OJ [2007] L 344/65.

Commission Recommendation 2008/850/EC of 15 October 2008 on notifications, time limits and consultations provided for in article 7 of Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communications networks and services, OJ [2008] L 301/23.

Commission Recommendation 2009/396/EC of 7 May 2009 on the Regulatory Treatment of Fixed and Mobile Termination Rates in the EU, OJ [2009] L 124/67 (Termination Rates Recommendation).